When Two Social Goals Collide

The rights and responsibilities of employers, employees and job applicants in light of California's updated Megan's Law

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Conflicting Social Goals

American society is governed by the rule of law. One of the purposes of the law is to establish rules in order to resolve, as equitably as possible, conflicts arising from a desire to pursue opposing social goals. The Legislative branch is primarily responsible for the creation of laws in our system of government. Legislators, elected by the people, must work together to create laws that will further society's goals. As we have seen over the years, however, the people, (and the legislators elected by them), may have very different priorities. Sometimes these priorities are in direct conflict with one another. When our legislators attempt to achieve goals seemingly opposed to one another laws may be enacted that provide for conflicting rights and duties. This can lead to confusion and frustration for the persons charged with fulfilling duties that are at odds with one another.

There may be no better illustration of the problem of competing social goals than California's Megan's Law. Here, in one law, we see the conflict between two opposing goals. Megan's Law allows for information to be provided to the public in a readily accessible manner so that citizens can take steps to protect themselves and others from sexual predators. However, the law specifically prohibits the use of that information to discriminate against these same individuals for the purpose of, among other things, employment. Two basic ideas, the protection of citizens and the rehabilitation and reintroduction into society of those convicted of crimes, are sharply at odds.

History

Sex offenders have been required by California law to register with local law enforcement agencies since 1947.[1] This information was first made available to the general public in 1994 when legislation was enacted requiring the establishment of a toll line telephone number providing information regarding the identity of persons convicted of sex offenses.[2]

In 1994, a young girl in New Jersey, Megan Kanka, was abducted, raped and murdered by a neighbor. Megan's family had not been aware that the neighbor had been previously convicted of sex offenses involving young girls. The news of this crime, and the circumstances surrounding it, generated a public outcry for access to information

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regarding sex offenders living in communities throughout the nation. Congress that year passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program as a result. This law conditioned certain federal law enforcement funding on a state enacting a version of what came to be called "Megan's Law." Such laws required the registration of sex offenders and the notification of community residents about sex offenders living among them.[3]

In 1996 California passed its version of Megan's Law (versions of Megan's Law have been enacted in all 50 states). It required the public have access to information concerning the identity of persons convicted of sex crimes against adults in addition to that already provided regarding the identity of persons convicted of sex crimes against children. In addition to the toll line, the California Department of Justice was required to produce a CD-ROM, available to the public at local police stations, containing information on serious and high-risk sex offenders.[4]

Assemblywoman Parra introduced Assemb. Bill 488 on February 14, 2003, as part of the 2003-04 regular session of the California Assembly. At that point, its purpose was primarily to allow campus law enforcement to release to members of the campus community information regarding the presence of sex offenders on campus.[5] On March 26th of the same year the bill was amended to require, for the first time, that sex offender information be posted on the Internet.[6] The final version of AB 488, the bill containing California's latest version of Megan's Law, passed the California legislature on August 24, 2004 and was approved by the Governor on September 24, 2004.[7]

This latest version of Megan's Law took a substantial step toward public disclosure and dissemination of information regarding sex offenders by requiring the California Department of Justice to create and maintain an internet web site by July 1, 2005, containing information contained in the state's sex offender registry.[8] A tiered approach is taken as to what information will be included on the web site for a particular offender. All offenders listed, regardless of what tier they fall into, have the following information listed: names, known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, and with certain exclusions, "any other information the Department of Justice deems relevant." In addition, the most serious offenders, including "any person who has ever been adjudicated a sexually violent predator," will have the address at which the person resides listed. Less serious offenders have their community of residence and ZIP Code listed, but not the address at which the person resides.

Purpose

The purpose of the Internet Web site, as stated by Assemblywoman Parra in her comments to the third reading of AB 488, is to allow the public greater access to information regarding sex offenders. She notes that the database information then provided was "not readily accessible for many Californians" while "almost every citizen has Internet access."[9] The author intended to make information about sex offenders residing in communities easily available to the public so that people would be able to take

reasonable and appropriate steps in order to prevent themselves and others from becoming victims of such offenders. In order to pass tests for constitutionality and prohibitions against discriminatory practices, however, the law had to include provisions indicating that it was not punitive, and that it could not be used for purposes amounting to discrimination. The law does this by providing that information on the web site may be used "only to protect a person at risk."[10] It also strictly prohibits the use of information on the web site for purposes relating to, among other things, employment.[11]

Employer, Employee, and Job Applicant Rights and Responsibilities

Employer Rights and Responsibilities

Under Megan's Law, employers have a duty not to use any information obtained through the Megan's Law web site in a manner that would amount to discrimination against an employee or job applicant. However, employers also have a duty to protect both employees and customers from foreseeable harm. Persons harmed may bring suit in tort under theories of "negligent hiring" "negligent supervision," or "negligent retention" when it can be established that an employer knew, or should have known, of the danger created by a potential or current employee.[12] Given the dual responsibilities of the employer, what steps can the employer take to accomplish the competing goals of protecting employees and not discriminating?

Tallahassee Furniture Co. v. Harrison illustrates some of the steps that an employer has a duty to take in order to protect its' other employees and customers.[13] In that case, an employee was hired to deliver furniture to customer's homes. The employer made no inquiries at all into the employees past, and the employee later brutally attacked a customer in her home. The customer was awarded a sizable recovery because the employer had failed in its' duty of care.[14]

From Tallahassee we can see that an employer must take reasonable steps to determine the background of job applicants, and if not previously done, existing employees, who will come into contact with its' other employees or customers in a manner that might foreseeably lead to victimization of the latter. These steps would include:

1) Interviewing prospective employees in order to ascertain suitability for the job. (Interviewers should be trained to appropriately elicit information from employees concerning prior convictions.)
2) Requiring prospective employees to fill out job applications asking for, among other things, information related to criminal history. (Employers are not prohibited from using self-disclosed criminal history information in determining suitability for employment.)
3) Conducting a criminal background check using other sources.[15]
4) Accessing the Megan's Law Web site in order to obtain information to protect persons at risk.

As noted, different avenues are available for an employer to determine criminal history. Job applications and interviews can already be used for this purpose, within certain guidelines. Employers are permitted to use information obtained from the Megan's Law Web site in order to protect persons at risk. Some jobs, if filled by sex offenders, would quite clearly lead to the creation of foreseeable risk. (A job requiring an employee to enter the residence of a customer or one requiring the supervision of minors, for example.)

Another way that an employer can protect himself from running afoul of the prohibition related to using criminal history information in a discriminatory way is by review and classification of jobs. It should be determined which positions are inappropriate for those convicted of sex crimes. Such action will better protect an employer from charges of discrimination than establishing a blanket policy of refusing to hire anyone with a criminal history.

Another problem may arise if the employer becomes aware of the criminal history of a current employee.[16] In Tallahassee, cited above, the employer became aware of problems with the employee during the course of employment and failed to take any action, allowing him to continue in his position as a furniture deliveryman. It is clear that, if in accessing the Megan's Law Web site an employer discovers information that indicates an existing employee is unsuited for a position he currently occupies, he would be remiss in ignoring this knowledge.[17] Should such a situation arise, what are the employers' options?

First, assuming the employer has reviewed and classified jobs so as to ascertain whether or not certain prior sex offenders should be excluded from them, the employer may be able to:

1) Transfer the employee to another position.
2) Increase supervision of the employee.
3) Terminate the employee.

The appropriate action will depend upon a number of factors. These would include: the amount of time that has elapsed since the conviction, the history of the employee since employment with the company (whether discipline measures have been taken, and for what reasons), the length of time the employee has been with the company, job performance ratings, and, of course, the degree to which the job in question provides opportunity for a similar offense.[18] The employer is much less likely to be seen as discriminatory in practice if he/she takes a reasoned and careful approach, analyzing a number of factors, in coming to decisions regarding job appropriateness.

Job Applicant and Employee Rights and Responsibilities

Even before being hired job applicants have rights based on both federal and state anti-discrimination statutes. For example, the California Financial Information Privacy Act prohibits the sharing of non-public personal information about a consumer without their

consent.[19] As the Web site established for Megan's Law information is public, and is not of a financial nature, the act would not appear to be impacted by, or to impact, Megan's Law.

The Fair Credit Reporting Act, however, provides that information of a person's character or personal reputation may be provided to businesses for employment purposes.[20] That would appear to coincide with the type of information that can be obtained through the Megan's Law Web site. Thus, the law would likely apply to information obtained by a consumer reporting agency through the Megan's Law Web site and subsequently provided to an employer. Here, the job applicant has the right to know that information provided to prospective employers is up to date and accurate. Whenever an employer takes adverse action based on such a report, the employer is required to provide the job applicant with contact information for the consumer reporting group and a notice of their right to receive a copy of the report. An employer would not appear to have any requirements under this act related to information obtained by it directly from the Megan's Law Web site.

The Fair Employment and Housing Act provides protection from discrimination in employment because of, among other things, race.[21] Because some racial groups may show a higher percentage of convictions in different areas of the country, general questions about criminal records are prohibited. However, an employer is permitted to ask job-related questions about convictions.

Further, the Fair Employment and Housing Act also provides an avenue for filing a claim if a job applicant believes that he/she has been unfairly discriminated against. The Department of Fair Employment and Housing (DFEH) will investigate complaints filed by job applicants, and DFEH legal staff may litigate a complaint before the Fair Employment and Housing Commission. The aggrieved applicant may recover damages in this situation, but they are normally limited to $150,000. Of course, the aggrieved applicant may, instead of pursuing a complaint through DFEH, file a claim in Superior Court. Damages awarded here are not so limited. Other remedies, under either option, include reinstatement and backpay.

Job applicants and employees also have responsibilities.

- A job applicant may or may not decide to give consent for a background check, but a company does have the right to conduct such an inquiry into the background of prospective employees. Therefore, a job applicant should give consent for such a check, and be prepared to explain any previous convictions, if related to the job applied for or currently held.

- A job applicant must be honest in answering questions. Dishonest answers to questions, either verbal or written, can be grounds for not hiring, or for later firing, an employee.[22]

Summary

California's Megan's Law affects employers, employees and job applicants. Employers have a dual responsibility to protect other employees and customers from foreseeable risks. In order to meet these responsibilities they should utilize available information, including that obtainable through the Megan's Law Web site, to identify job applicants and employees that might foreseeably pose a risk to others. Further, they must do so in a careful, considered manner, and would be wise to implement:

- A system of classification for jobs in order to ensure that Megan's Law information is utilized only for employment where the job in question is one in which a convicted sex offender would pose a risk to identifiable others.

- Interview techniques and training designed to elicit self-reporting of relevant conviction information while at the same time avoiding unlawful discrimination.

Employees and Job Applicants should:

- Be honest during the job application and interview process.

- Consent to a background check and be prepared to explain prior convictions related to the job sought.

- Be careful to establish a consistent work history where employed.

If an employee or job applicant feels that he/she has been discriminated against, they may bring a complaint either to the FEHC or to the California court system.

Megan's Law, while addressing conflicting goals, need not be a source of frustration for either employers or employees if they recognize the needs of both sides and take steps, including those mentioned herein, to work honestly and equitably with each other.

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[1] Rod M. Fliegel and Justin Curley, California's New Megan's Law Web site: Employers Are Cautioned Not To Make Precipitous Employment Decisions, ASAP Newsletter, Littler Mendelson, Jan. 2005, www.littler.com.
[2] Ibid.
[3] *Fredenburg v. City of Fremont***,** 119 Cal.App.4th 408 (2004).
[4] Op. Cit., Fliegel.
[5] Assemb. Bill 488, Parra, California Legislature, 2003-04 Regular Session.
[6] Assemb. Bill 488, Parra, Amended in Assembly March 26, 2003, California Legislature, 2003-04 Regular Session.
[7]Assemb. Bill, Parra, Complete Bill History, http://info.sen.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_488_bill_20040924_history.html.
[8] Cal. Pen. Code § 290.46.
[9] Assemb. Bill 488, Parra, Bill Analysis, June 2, 2003.
[10] Op. Cit., Cal. Pen. Code § 290.46.

[11] Id.
[12] HU.S.C.A. Const.Amend. 1H. HJane Doe I v. Malicki, 771 So. 2d 545 (Fla. Dist. Ct. App. 3d Dist. 2000)H.
[13]Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. Dist. Ct. App. 1st Dist. 1991).
[14] Id.
[15] Boarding school could not be held liable for misconduct of recreational supervisor who allegedly engaged in consensual sexual relationship with 13- year-old female student, based on theory that school was negligent in hiring, retaining or supervising employee, where evidence established without dispute that records check was conducted on employee before he was hired, but that it turned up no information suggesting that he had any criminal record or propensities. HDoe v. Village of St. Joseph, Inc. , 202 Ga App 614, 415 SE2d 56, 103-25H (1992). Distributor's testimony that although he had not done a background check on salesman who sexually assaulted customer, he would have done so if manufacturer had directed him to, evidence that distributor would have learned about salesman's past problems if he had performed a background check, and testimony from distributor that he would not have hired salesman if he had learned about salesman's criminal history, was legally sufficient to support a cause-in-fact finding in negligence case. HRead v. Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998)H
[16] An employer may be liable for negligent retention when during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment. HOlson v. First Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003)H
[17] Where gas station employee assaulted customer and customer brought suit against franchisee that operated station and oil company that owned station, trial court erred in granting defendants summary judgment where evidence was presented that franchisee knew of prior violent behavior by the employee, and therefore a material question of fact existed as to whether the franchisee knew or should have known that the employee was a threat to others. Accordingly, owner of station might be liable under the theory of apparent agency for failing to provide adequate security and/or failing to remedy a foreseeable danger. HBransford v. Berman, 601 So.2d 1306H,17 Fla. L. Weekly D1637 (Fla. Dist. Ct. App. 4th Dist. 1992).
[18] In action arising from alleged sexual misconduct of priest with 11-year-old boy, parish, school, and diocese which employed priest were not entitled to dismissal of causes of action for negligent hiring of priest and negligent failure to periodically evaluate him; if plaintiffs were successful in establishing that, with knowledge that priest was likely to commit sexual abuse on youths with whom he was put in contact, his employers placed or continued him in setting in which such abuse occurred, fact that placement occurred in course of internal administration of religious institutions would not preclude holding such institutions accountable for their neglect. HJones v. Trane1, 53 Misc 2d 822, 591 NYS2d 927H. (1992 Supp).
[19] California Fin. Code §§ 4050-4059.
[20] 15 U.S.C. §§ 1681 et seq.
[21] Fair Employment and Housing Act, Cal. Gov't Code § 12900 et seq.
[22] http://employment.findlaw.com/employment/employment-employee-hiring/employment-employee-hiring-resume.html